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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

VS.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,

Appellee.

On Appeal From The United States District Court For The Western District of Texas

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

PAGE

Argument 2

Conclusion 8

TABLE OF AUTHORITIES

CASES PAGE

Alewine v. *City of Augusta*, 505 F. Supp. 880 (S.D. Ga. 1981) *appeal pending*, No. 81-7490 (11th Cir.) ...2, 3, 5, 6

Dove v. *Chattanooga Area Regional Transit Authority*, Civ-1-80-249 (E.D. Tenn. July 21, 1981), *appeal pending*, No. 81-5636 (6th Cir.) 2, 3, 5, 6

Hodel v. *Virginia Surface Mining & Reclamation Ass'n., Inc.*, —— U.S. ——, 101 S. Ct. 2352 (1981) .. 4

Joiner v. *City of Macon*, No. 79-287-MAC (M.D. Ga., Apr. 27, 1981), *appeal pending*, No. 81-7789 (11th Cir.) 2, 3, 5

Kramer, et al. v. *New Castle Area Transit Authority*, No. 81-2223 (3rd Cir. 1982) 2, 3, 4, 8

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 2, 4, 5, 7

United Transportation Union v. *Long Island Railroad*, No. 81-1925, —— U.S. ——, 50 U.S.L.W. 4315 (4/24/82) 2, 3, 4, 7

United Transportation Union v. *Long Island Railroad*, 634 F. 2d 19 (2nd Cir. 1980) 2

Cases	Page
Constitution, Statutes, Regulations	
Fair Labor Standards Amendments of 1961, Public Law 87-30 § 2(s)(2), 75 Stat. 65	6
Fair Labor Standards Amendments of 1966, Public Law 89-601, § 102(a)(2), (b), 80 Stat. 830	6
Fair Labor Standards Amendments of 1974, Public Law 93-259, § 21(b)(1) – (3), 88 Stat. 55	6
42 Fed Reg. 32253 (1977), codified at 29 CFR 775.2(b)(d), and 775.3(b)	2
Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.*, § 1609(c)	6, 7
Other	
H.R. Rep. No. 204, 88th Cong., 2nd Sess., *reprinted in* U.S. Code Cong. & Ad. News	5
American Public Transit Association, Transit Fact Book, 1981	5

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ARGUMENT

Appellant, Joe G. Garcia, files this Supplemental Brief to call this Court's attention to the impact on this case of this Court's decision in *United Transportation Union* v. *Long Island Railroad,* No. 81-1925, —— U.S. ——, 50 U.S.L.W. 4315 (4/24/82) and the ruling of the United States Court of Appeals for the Third Circuit in *Kramer, et al.* v. *New Castle Area Transit Authority,* No. 81-2223 (3rd Cir. 1982), issued since the filing of Appellant's Jurisdictional Statement.

As set forth in Appellant's Jurisdictional Statement (at 19), this case is one of five such cases pending in federal courts around the country. *Dove* v. *Chattanooga Area Regional Transit Authority,* Civ-1-80-249 (E.D. Tenn. July 21, 1981), *appeal pending,* No. 81-5636 (6th Cir.); *Kramer* v. *New Castle, supra, Alewine* v. *City of Augusta, Georgia,* 505 F. Supp. 880 (S.D. Ga. 1981), *appeal pending,* No. 81-7490 (11th Cir.) and *Joiner* v. *City of Macon,* No. 79-287-MAC (M.D. Ga., Apr. 27, 1981), *appeal pending,* No. 81-7789 (11th Cir.). These cases were all filed within months of the issuance of the Department of Labor interpretative regulation, 42 Fed. Reg. 32253 (1977), codified at 29 CFR 775.2(b), (d), and 775.3(b), where the Labor Department classified local mass transit systems as not within the immunity set forth by this court in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Before any of the above listed cases could be decided, the United States Court of Appeals for the Second Circuit ruled in *United Transportation Union* that, under *National League of Cities* v. *Usery,* the Tenth Amendment to the U.S. Constitution precluded the application of the federal Railway Labor Act to the Long Island Railroad. *United*

Transportation Union v. *Long Island Railroad,* 634 F. 2d 19 (2nd Cir. 1980), *rev'd., United Transportation Union, supra.* Shortly thereafter, the federal district courts in *Dove, Alewine* and *Kramer,* ruled, largely on the strength of the Court of Appeals decision, that the Tenth Amendment immunity extended similarly to local mass transit.[1]

In the instant case, the Plaintiff, San Antonio Metropolitan Transit Authority ("SAMTA"), and Plaintiff-Intervenor, American Public Transit Association ("APTA"), similarly urged the district court that the decision of the Court of Appeals in *Transportation Union* was "remarkably applicable" to this case and squarely supported their position. (Supplemental Memorandum of American Public Transit Association in support of Plaintiff's Motion for Summary Judgment and in Reply to Defendant's Supplemental Memorandum, October 20, 1980, p. 5).[2] Thus, here, as in *Dove* and *Alewine,* the reversal of the Court of Appeals decision in *Transportation Union* completely undercuts the rationale for the holding.

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1. By contrast, without referring to *United Transportation Union,* the United States District Court for the Middle District of Georgia ruled in *Joiner* that the Tenth Amendment does not immunize the local mass transit system there from application of the F.L.S.A.

2. On October 21, 1980, SAMTA filed a memorandum to the district court in which it set forth the application of the nature and essentiality of local transit as a function of state or local government, asserting: "[This] is the only issue involved in the instant case, and the Second Circuit's decision, being squarely in point, is conclusively dispositive of that issue." (Plaintiff's Response to Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment, p. 3). *See, also,* Memorandum Attaching the Second Circuit's decision of September 15, 1980 in *United Transportation Union* v. *Long Island Railroad Co.,* in Further Support of Plaintiff's Motion for Summary Judgment, filed in the district court on September 18, 1980.

Immediately after the issuance of this Court's decision in *Transportation Union,* the Court of Appeals for the Third Circuit ruled in *Kramer* reversing the district court and holding that: (1) transit services historically have been privately provided and subject to federal law; accordingly, under this Court's decision in *Transportation Union,* the state may not, by acquiring such services, insulate them from the application of federal law; (2) the transfer of mass transit services to public ownership was caused and fueled by federal funding; accordingly, transit, when public, is a joint federal-state undertaking and not a traditional state function at all.

As the Court of Appeals for the Third Circuit properly ruled in *Kramer,* this Court's holding in *Transportation Union* dictates reversal of the district court ruling here. First, the function and history of both the Long Island Railroad and local mass transit generally are so similar that *Transportation Union* would dictate the outcome here in any case. Both involve primarily the transportation of commuter passengers with an urban metropolitan area. Like the commuter train service of the Long Island Railroad, local transit systems were privately owned and operated for years.

Next, setting forth the general standard for invalidating federal law under a *National League of Cities* claim, this Court reiterated the ruling in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n., Inc.,* —— U.S. ——, 101 S. Ct. 2352 (1981), that:

> . . . it must be apparent that the States' compliance with the federal law would directly impair their ability "structure integral operations in areas of traditional functions." *Id.,* at 852. —— U.S. ——, 50 U.S.L.W., at 4317.

This Court then held that this "key" (*Id.*) third prong of the *National League of Cities* standard required a finding that "the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Id.* at 4318. This Court clarified that test immediately by holding that the Tenth Amendment did not require "a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.*

Under this standard, as the Third Circuit just held, the local transit industry does not quality for Tenth Amendment immunity from the Fair Labor Standards Act. Throughout most of its history, transit has been provided by private companies. In 1960, 95% of transit was privately owned and operated. H.R. Rep. No. 204, 88th Cong., 2nd Sess., *reprinted in,* U.S. Code Cong. & Ad. News, 2569, 2590. Not until 1967 were even half of all transit riders patronizing publicly owned systems. American Public Transit Authority, Transit Fact Book, 1981, page 27.[3]

In 1961, when 95% of the 1251 transit systems in the country were privately owned, Congress extended the minimum wage laws to private mass transit operations. Public

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3. The Chattanooga Area Regional Transportation Authority, at issue in *Dove,* began to provide formerly private transit services in 1973. *Dove, supra,* slip op. at 2. Augusta, Georgia, similarly did not take over the privately provided transit operations in Augusta until 1973, *Alewine, supra,* 505 F. Supp. at 884; nor did the City of Macon act to purchase the Macon transit system until 1973. *Macon, supra,* slip op. at 2. In San Antonio, the San Antonio Transit System operated under a trust indenture for the benefit of bond holders until the creation of SAMTA in 1978.

Law 87-30, § 2(s)(2), 75 Stat. 65 (1961). In 1966, overtime protections of the FLSA were added to the protections of employees of private employers and both minimum wage and overtime protections were extended to employees of public transit authorities as well. Public Law number 89-601, § 102(a)(2), (b), 80 Stat. 830 (1966), excepting only overtime for operating employees. In 1974, Congress phased out the overtime exemption for operating employees. Public Law No. 93-259, § 21(b) (1) – (3), 88 Stat. 55 (1974).

Moreover, transit services were never a part of the tradition of state government. To the contrary, the states' assumption of transit services out of the private sphere has been overwhelmingly accomplished through the vehicle of federal funding. Thus, the creation of SAMTA, like the creation of CARTA and the city transit system in Augusta, Georgia, were all accompanied by the immediate influx of the large scale federal funding under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.*[4] In CARTA and Augusta, the federal funds were used to buy out the system. *Dove, supra,* slip op. at 2; *Alewine, supra,* 505 F. Supp., at 884. In San Antonio, the operators of the San Antonio Transit System threatened to close it down unless large scale federal funding was made available to them.

Overall, as the Cohn Affidavit in the record here reflects, from 1967 through 1979, 80% of the public takeovers of private transit in systems where the Amalgamated Transit Union represents employees were financed with direct federal takeover grants. Even in the 20% of other public operations, all, save one, were dependent upon the imme-

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4. Macon, Georgia, used federal revenue sharing money. (Slip op. at 3).

diate influx of federal capital assistance to create a viable system. As Appellant Garcia set forth in his Jurisdictional Statement, as a reflection of that state/federal partnership, § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), imposes an obligation to continue collective bargaining after a public takeover. The preservation of federal labor relations has meant that, through collective bargaining, the overwhelming majority of mass transportation systems already afforded operators overtime pay, even if they would not have been covered by the overtime provisions of the Federal Fair Labor Standards Act prior to the public takeover. Accordingly, as in *Transportation Union*, the states embarked upon the local mass transit enterprise knowing that the substance of federal labor relations was to continue into the public sphere.

Under these circumstances, like the Long Island Railroad, local transit service generally has a long history of federal regulation in the private sphere. Accordingly, to apply Tenth Amendment immunity now would violate the core of this Court's ruling in *Transportation Union* — that states may not withdraw subjects of traditional federal regulation wholesale, into *National League of Cities* immunity. Second, as the Third Circuit pointed out, local transit never even passed into a local public tradition, much less to the status of a function essential to the survival of the sovereign state, because it passed out of the private sphere into a partnership between federal and local providers. Accordingly, the obligation to comply with the Fair Labor Standards Act in local transit service does not remotely displace the states' sovereign role as *Transportation Union* requires.

CONCLUSION

In conclusion, the district court decision is both in error and in conflict with the decision of the Third Circuit in *Kramer*, and plenary consideration is warranted here.

Respectfully submitted,

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